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No. 97-1287

In The
Supreme Court of the United States

October Term, 1997

Hughes Aircraft Company;
Hughes Non-Bargaining Retirement Plan,
Petitioners,
v.

Stanley I. Jacobson; Daniel P. Welsh;
Robert E. McMillin; Ernest O. Blandin;
Richard E. Hook,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AT&T, RCA, AND BOEING EMPLOYEES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

This brief is submitted by certain former employees of RCA Corporation and AT&T Corporation and the Seattle Professional Engineering Employees Association (jointly "Amici").[1] The Amici offer the Court concrete examples

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[1] Pursuant to Supreme Court Rule 37.6, this Brief was authored in its entirety by attorneys for Amici. The Amici are the only persons or entities who made a monetary contribution to the preparation and submission of this Brief. The consents of Petitioners and Respondents to this brief as amici curiae under Rule 37.3(a) have been filed with the Clerk.

of the dramatic and adverse effect of the rulings sought by Hughes on employee benefit plans and their participants and sponsors.

The RCA Employees are Plaintiffs-Appellants in *Brillinger v. GE*, 130 F.3d 61 (2d Cir. 1997). A petition for certiorari was filed on May 13, 1998, 66 USLW 3758 (US), and is pending as No. 97-1834. The claims in these cases relate to the disposition of residual assets of the RCA Pension Plan, estimated at $1,344,377,186 which are due in part to employee contributions. All of the assets of the RCA Pension Plan were taken by the GE Pension Plan in a plan merger without any distribution or adjustment to provide RCA Employees with the benefit of residual assets attributable to their employee contributions to the RCA Pension Plan.

The [former] AT&T Employees are Systems Council EM-3, I.B.E.W., and 17 individual plan participants who have filed a class action on behalf of over 16,000 current employees of Lucent Technologies formerly were employed by AT&T Corporation and union and management retirees assigned to Lucent, *Systems Council EM-3, I.B.E.W. v. AT&T Corporation*, 972 F. Supp. 21 (D.D.C. 1997). An appeal is pending as No. 97-7155 (D.D.C.) with oral argument scheduled for September 24, 1998. This case challenges the allocation of over $40 Billion in pension plan assets and some $3 Billion in assets of a welfare benefit plan (which is not regulated by ERISA except through fiduciary duty) by AT&T in a fashion which appears to favor AT&T. The District Court has held that AT&T's actions to allocate the $43 Billion in its favor are only a "plan amendment" under *Lockheed Corp. v. Spink*, 517 U.S. 882, 116 S.Ct. 1783 (1996) which is not susceptible to judicial review.

The Seattle Professional Engineering Employees Association ("SPEEA") is the collective bargaining representative for nearly 26,000 professional engineering and

technical employees at Boeing Company operations in seven states. SPEEA represents employees at The Boeing Company who are currently covered by a defined-benefit retirement pension plan, including employees who have worked at other aerospace firms under contributory retirement plans. The current uncertainty in the aerospace industry and recent experience with use of $100 million of pension fund assets to offset the cost of acquisition of Rockwell International's defense electronics unit has led Boeing employees to rethink their retirement plan structure. SPEEA and its members are deeply concerned about a possible ruling that employer actions to control and dispose of pension plan assets in plan reorganizations are not subject to reasonable fiduciary obligations.

SUMMARY OF ARGUMENT

Hughes and its amici argue that an employer's power to "amend" an employee benefit plan allows it to make a complete change in the plan's benefit structure, beneficiaries and source of financing without any obligation to employees who have contributed to the plan based on this Court's decision in *Lockheed Corporation v. Spink*, 517 U.S. 882, 116 S.Ct. 1783 (1996). This is a perverse reading of *Lockheed* whose basic point is that ERISA does not disturb the rights of "settlors" to a trust at common law.

A "settlor" is a person who has contributed property to a trust. At common law, any surplus in a trust—namely trust assets in excess of amounts reasonably required to meet its defined liabilities—is divided among all contributors in proportion to their contributions. A similar rule is codified for ERISA pension trusts through 29 U.S.C. §§ 1344(d)(3), 1058 for express application in any termination, merger or transfer of assets and liabilities between pension plans. The common law rules governing both surplus and allocation of assets in an organic change of a trust remain in place through the fiduciary provisions of ERISA for assets of employee welfare benefit plans.

An employer's power to "amend" an employee benefit plan is simply a codification of its common law power to amend a "unilateral contract" for employee benefits with its employees. ERISA has changed the unsecured nature of the common law benefit promise by interposing a trust which accumulates assets in advance of the time for payment of "deferred compensation" in the form of a pension. It is the trust—rather than the employer—which is liable for actual payment of benefits to the employees. The employer's contractual power to amend its offer of benefits to employees does not include a power to exercise the powers of the trustee over plan assets and invade the corpus of the trust for its own purposes.

The fact that an employer action is an "amendment" of a plan does not exclude simultaneous classification of the transaction as a termination, merger or transfer of assets or liabilities of a plan. In these situations, 29 U.S.C. §§ 1058, 1344(d)(3) give the employee "shareholders" of a contributory pension trust an appraisal remedy through a valuation and allocation of plan assets and any surplus. These rules reflect the intent of Congress, *H.R. Rep.* 100-391, p. 130, reprinted [1987] U.S. Code Cong. & Adm. News at 2313-105, that "employees will virtually always receive a distribution of assets from [the surplus] of a plan to which they have contributed."

ERISA provides that money allocable to an employee on termination of a pension plan, including a portion of any surplus attributable to his contributions, will either be distributed to the employee (in a termination) or follow him into any new plan (in the case of a merger or transfer), without loss or dilution as "security" for payment to the employee. The fiduciary rules provide a *pro rata* distribution of assets in proportion to liabilities, as at common law, in the case of a welfare plan.

The experiences of the Amici offer concrete examples of the dangers in a holding that *Lockheed* gives employers

carte blanche in dealing with benefit plan assets. The AT&T Employees negotiated a retiree medical trust which had only $2.985 Billion in assets to cover some of $9.125 Billion in liabilities at the time of the spin-off of Lucent Technologies. A District Court has concluded that *Lockheed Corp. v. Spink* allows AT&T to keep all $3 Billion of trust assets while imposing over $6.3 Billion in liabilities with no assets on Lucent. In a simple version of rulings in General Electric cases, GE acquired RCA which had a contributory pension plan with assets of $2.82 Billion and plan liabilities of only $1.47 Billion. This left a surplus of $1.34 Billion of which $336 Million was allocable to employee contributions in a termination. Instead of terminating the plan, GE sold the RCA operations and employees but only transferred assets equal to the cost of basic benefits of $1.47 Billion to the buyer's pension plan. GE now can terminate the remaining plan (which has no participants) and take the entire surplus for itself. In a variant of this option, GE merged the RCA plan into its larger plan, diluted the employees' share down from $336 Million to $30 Million overnight and used the difference to fund its own obligations to GE employees without ever contributing a dime to the RCA Plan. If ERISA condones such common law fraud and allows employers to invade an ERISA trust and reallocate its assets at will in a plan reorganization, the "security" of trust assets which is promised by the very title of the statute—the Employee Retirement Income Security Act—is illusory.

ARGUMENT

Petitioner Hughes Aircraft seeks a determination from the Court that an employer may use residual assets of a pension plan attributable to employee contributions as it wishes and with no possible judicial review as long as it titles its document "Plan Amendment" and does not file a notice of termination with the Pension Benefit Guaranty Corporation ("PBGC"). If Hughes is correct, employees will never have a claim for relief or judicial oversight of

the use or abuse of the nation's $2 *Trillion* in pension assets which is the "biggest lump of money in the world," *H.R. Rpt. 100-391*, reprinted in [1987] U.S. Code Cong. & Admin. News at 2313-129. The purpose of this Brief is to focus on the far-ranging effects of Hughes' arguments on benefit plan reorganizations which follow from corporate mergers and acquisitions.

I. *LOCKHEED CORPORATION v. SPINK* DOES NOT ADDRESS THE DISPUTE BETWEEN MULTIPLE SETTLORS—EMPLOYER AND EMPLOYEES—IN THIS CASE AND, IF ANYTHING, RESOLVES THE CASE IN FAVOR OF THE EMPLOYEES UNDER THE COMMON LAW RIGHTS OF SETTLORS

Hughes sweeps with a broad brush in seeking to dismiss claims for lack of a fiduciary duty in reliance on *Lockheed Corp. v. Spink*, 517 U.S. 882, 116 S. Ct. 1783 (1996). *Lockheed* involved an action by an employee seeking to overturn a contract offer by Lockheed which conditioned Spink's right to retire early on a waiver of any employment claims against Lockheed, *Lockheed*, 517 U.S. at 885, 116 S. Ct. at 1787. The Court concluded that "Lockheed acted not as a fiduciary but as a settlor when it amended the terms of the plan to include the retirement programs [offered to Spink]" as the threshold decision to provide employees benefits is not governed by ERISA, *Lockheed*, 517 U.S. at 891, 116 S. Ct. at 1790. With respect to 29 U.S.C. § 1106(a)(1)(D), the Court then noted that the language of the section, ". . . does not in direct terms include the payment of benefits to a plan participant by a plan administrator" as a prohibited transfer or use of plan assets, *Lockheed*, 517 U.S. at 892, 116 S. Ct. at 1790.

Lockheed Corp. v. Spink rests on the basic point that ERISA does not disturb the rights of "settlors" to a trust at common law. Indeed, there is nothing in ERISA on the rights of settlors beyond a procedural requirement that "[e]very employee benefit plan shall— . . . (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan. . .," 29 U.S.C. § 1102(b)(3). Neither this language nor the definition of a "plan sponsor" in 29 U.S.C. § 1002(16)(B) confer any express power on an employer.

On matters not explicitly governed by ERISA, the courts follow the Congressional direction to apply ". . . principles developed in the evolution of the law of trusts. . ." to create a federal common law of employee benefits, *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110, 109 S.Ct. 948, 954 (1989) quoting *H.R. Report 93-533*, p. 11 (1973) reprinted [1974] U.S. Code Cong. & Adm. News 4639, 4649. "The courts apply these common law trust standards 'bearing in mind the special nature and purpose of employee benefit plans.'" *Varity Corp. v. Howe*, 516 U.S. 489, 506, 116 S. Ct. 1065, 1075 (1996), quoting *H.R. Conf. Rep.* No. 93-1280, p. 302, reprinted, 3 Leg. Hist. of ERISA 4569 (GPO 1976). These concepts apply to the federal common law rights of settlors under ERISA.

The fundamental distinction in purpose and economics between the traditional gratuitous common law trust and an employee benefit plan is the contractual nature of the employee benefit plan, *Collins v. UMWA Funds*, 298 F. Supp. 964, 967 (D.D.C. 1969); *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 240, 98 S. Ct. 2716, 2720 (1980) (state legislation affecting pension trust impairs contract between employer and employee); *Coe v. Washington Mills*, 149 Mass. 543, 547, 21 N.E. 966 (1889) (employee sick and relief fund akin to private insurance contract and not a charity); *Shenango Pottery Workers Association v. Crawford*, 59 D&C 426, 430 (Pa. Comm. Pleas 1942) (similar on employee association assets). The Court thus has noted, *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 148, 105 S. Ct. 3085, 3093 (1985), that ERISA was designed to protect these "contractually defined benefit expectations" within the framework of the law of trusts.

A "settlor" is a person who contributes property to a trust, Bogert & Bogert, *The Law of Trusts and Trustees,* §§ 41, 43, pp. 428, 438-439 (rvsd. 2d ed. 1984) ("*Bogert*"). In this case, the pension trust has received contributions of property from the employees (at all times from 1953 to 1991 or beyond) as well as the employer, Hughes (until 1986).

The common law recognizes a resulting trust in favor of the grantor when assets already in trust exceed the amount needed to insure payment of its designated liabilities, *Wilson v. Bluefield Supply Co.*, 819 F.2d 457, 464 (4th Cir. 1987); *Restatement (Second) Trusts,* § 430, p. 378 (ALI 1959); *Bogert,* § 469, p. 450. Where there are several donors, the trustee holds a surplus for all contributors in proportion to their contributions, *Restatement,* § 430, p. 381, Comment j; § 432, p. 387, Comment d; V Scott & Fratcher, *The Law of Trusts,* § 430.3, p. 111, § 430.4, p. 113, § 432, p. 129 (4th Ed. 1986) ("*Scott*"); *Coe,* 149 Mass at 549, 21 N.E. at 967; *Colonial Trust Company v. Comm'r,* 111 F.2d 740, 742 (2d Cir. 1940); *Rehder v. Rankin,* 249 Iowa 1201, 1205, 1207, 91 N.W.2d 399, 402 (1958). The allocation is done in proportion to contributions, regardless of the time they were made, *Restatement,* § 432, p. 387, Comment d. See also, *Restatement* §§ 433, 434, 435, p. 388-389 (in contractual trust, surplus goes to the person providing the consideration for the transfer in trust); V *Scott,* §§ 433-435, pp. 130-132 (same). The only exception is that money received after the trustee knows that the trust has adequate assets to perform its function is returned to such contributors on a priority basis, *Restatement,* § 432, p. 387, Comment d; V *Scott,* § 430.3, p. 113. In this case, the Hughes pension trust has been overfunded since 1986 although employee contributions continued.

Coe v. Washington Mills, 149 Mass. at 544-545, 21 N.E. at 966-967, dealt with a sick and relief fund which

was funded by both employer and employee contributions. The court was asked to divide residual assets between conflicting claims of the company and a charity designated by the employees for their share of the surplus. The employer sought to retain assets attributable to employee contributions and rested its claim on its express power under the trust ". . . to decide points of dispute and manage the internal affairs of the [trust]," *Coe,* 149 Mass. at 550, 21 N.E. at 967. The court held that this power did not extend so far as to allow the employer to decide the "disposal of the funds," *id.* The court held that the employee contributions to the fund created a contractual arrangement which gave the employees as well as the employers a right to the residue in the resulting trust, *Coe,* 149 Mass. at 547-549, 21 N.E. at 967. The Congressional designation of "disposition" of plan assets as a fiduciary function, 29 U.S.C. § 1002(21)(A)(i), requires a similar rule in any organic or fundamental reorganization of an ERISA trust.

The common law went further to require unanimous consent to any alternative disposition of funds. *Shenango Pottery Workers,* 59 D&C at 426, 427, 428, involved an association formed as a social club for employees which was left with a residue of assets when it dissolved as a result of a change in membership. The court held that no one had authority to vote away the property of another contributor, *Shenango,* 59 D&C at 431, 432. As the enterprise was not charitable, its property belonged to its members in proportion to their contributions absent unanimous consent to "disposing" of it to another group or purpose, *Shenango,* 59 D&C at 430, 431, 433. *Flint v. Codman,* 247 Mass. 463, 142 N.E. 256 (1924), applied the same rule to enjoin the sale of assets of a Massachusetts business trust—a common law entity comparable to a contractual employee benefit plan—despite the vote of the majority of the trust beneficiaries to sell the assets of the trust in good faith and for fair and reasonable value.

II. ERISA GIVES EMPLOYEE "SHAREHOLDERS" IN A CONTRIBUTORY PENSION PLAN AN APPRAISAL REMEDY IN A TERMINATION, MERGER OR TRANSFER OF ASSETS OR LIABILITIES

In its careful surgery on the common law, Congress chose to accept the suggestion of *Bogert*, § 247, p. 229, to apply corporate and contractual concepts to contractual business trusts—such as ERISA plans—to modify the common law. ERISA's allowance for an amendment procedure which vests all "voting" power in an employer eliminates the common law requirement for unanimous consent of all contributors to an organic change in a benefit plan. This is consistent with the rights of employers at common law to amend a "unilateral contract" with employees with respect to employee benefits. See generally, Private Pension Plans: Construction of Provision Authorizing Employer To Terminate or Modify Plan, 46 A.L.R. 3d 464. The power to amend a contract for future work or benefits does not include nor imply additional power over assets already committed to the legal control of a trustee upon reorganization of a benefit trust under the common law or ERISA.

A. 29 U.S.C. § 1344(d)(3) Protects Employee Claims To The Fruits Of Their Contributions On Termination Of A Defined Benefit Pension Plan.

The counterbalance to an employer's "voting" control in ERISA plans is an appraisal remedy, similar to that normally given to dissenting or minority shareholders in a corporate reorganization, with respect to their interest in the enterprise. See, *Kademian v. Ladish Company*, 792 F.2d 614, 628-629 (7th Cir. 1986) (appraisal remedy is "the *quid pro quo* for statute giving the majority the right to override the veto which previously the holder of even one share could exercise against mergers, sales of all assets, and other basic corporate changes"). ERISA requires that promised pension benefits be funded through a separate trust which accmumulates assets—beyond the control of the employer—and pays benefits to the em-

ployees, 29 U.S.C. § 1103(a). The security provided by this trust is then protected through an appraisal and allocation of its assets upon a fundamental change in the plan.

It is a truism that the day-to-day operation of a defined benefit plan is done on a pooled basis for all employees through a group trust over a period of years, 29 U.S.C. §§ 1081, 1082(b), (c), so that assets are not segregated or allocated to any particular individual employee or benefit, *Johnson v. Georgia Pacific Corp.*, 19 F.3d 1184, 1189-1190 (7th Cir. 1994). *Lockheed* and *Johnson* both involved single, ongoing and solvent pension plans with no organic changes in the participant group or financing of the pension enterprise to go beyond this basic concept.

A plan termination is however an exception to the normal rule for 29 U.S.C. § 1344(a) directs that '. . . the plan administrator shall allocate the assets of the plan . . . among the participants and beneficiaries of the plan . . ." upon termination. The statute gives priority to six categores of payments to employees under the written terms of the pension plan, 29 U.S.C. § 1344(a)(1)-(6). See also, *Mead Corp. v. Tilley*, 490 U.S. 714, 717, 109 S. Ct. 2156, 2159 (1989) (§ 1344 "requires that plan assets be distributed to participants" in priority). In a contributory plan, 29 U.S.C. § 1344(d)(3) requires that any assets remaining after the purchase of annuities for "benefits under the [terms of the] plan," 29 U.S.C. § 1344 (a)(6), must be divided between the employer and employees in rough proportion to their contributions.[2]

[2] The fraction in 29 U.S.C. § 1344(d)(3) is an actuarial shortcut designed to estimate proportionate contributions and provide "rough justice" using readily available data and standard calculations in any termination allocation. The numerator is the current value of employee contributions under 29 U.S.C. § 1344(a)(2) with interest at 5% through December 22, 1987, 29 U.S.C. § 1054(c)(2)(C)(iii) (1976) (obsolete) and 120% of the federal mid-term rate thereafter, 29 U.S.C. § 1054(c)(2)(C)(ii)(I); 26 U.S.C. § 1274. The denominator estimates total contributions to the plan as being equal

The purpose of 29 U.S.C. § 1344(d)(3) is to assure that there will "virtually always be a distribution to participants and beneficiaries" from residual assets of a pension plan to which they have contributed on a plan termination, *H.R. Report 100-391*, p. 130 reprinted at [1987] U.S. Code Cong. & Admin. News at 2313-104. 29 U.S.C. § 1344(d)(3) is indeed part of a "great compromise," Brief of Petitioners, p. 11, which gives the employer the benefit of gain on employee contributions in an ongoing plan while protecting the employees against use of gains attributable to employee contributions to pay benefits to a different plan or group of employees when the plan undergoes a fundamental change.

29 U.S.C. § 1344(d)(3) was enacted for the specific purpose of overriding *LLC Corp. v. PBGC*, 703 F.2d 301 (8th Cir. 1983), which accepted the argument—reiterated in new clothes by Hughes and its amici—that the existence of *some* funding exposure for an employer in a contributory plan gives the employer a right to *all* residual assets, *Holland v. Valhi, Inc.*, 22 F.3d 968, 978 (10th Cir. 1994), quoting *H.R. Rep. 100-391(1)*, p. 130, reprinted [1987] U.S. Code Cong. & Admin. News at 2313-105 (complete reversion allowed by LLC never intended) An original legislative proposal for the pension asset allocation rules gave first priority to employee contributions and *actual* investment earnings on such contributions, *Bridgestone/Firestone, Inc. v. PBGC*, 892 F.2d 105, 109-110 (D.C. Cir. 1989) (reviewing legislative history and intent). The final version, however, limited the priority investment credit under 29 U.S.C. § 1344(a)(2) to a safe (Treasury) rate of return, *id.*; Brief of Petitioners, p. 30; see n.2, *supra*.[3] This final legislative compromise thus placed both participants and the employer in a subordinated position with respect to investment earnings over a safe investment return (i.e., Treasuries), see n.2, *supra*, to assure priority payment of basic benefits promised by the plan document.

to the present value of the total liability for accrued benefit promised by the terms of the plan. This credits employer contributions, which are actuarially determined from ultimate benefit liabilities under 29 U.S.C. § 1082, with "interest" at Treasury or comparable rates in reverse by discounting future benefit payments to the present at such rates to match apples to apples. See, 26 U.S.C. § 417(e) (use of Treasury rate to discount annuity rights to present in calculating lump sum benefit values). For a variety of reasons including reduced employer funding from investment gains, the formula often produces an employee share far below an actual accounting. See, *Bridgestone/Firestone Inc. v. PBGC*, 892 F.2d 105, 108 n.3 (D.C. Cir. 1989) ($8.1 Million employee share under statutory formula versus $79.2 Million by an actual accounting).

Hughes and its *amici* all ignore the statutory definition of a "defined benefit plan" as "[any] pension plan other than an individual account plan," 29 U.S.C. § 1002(35). The category thus is not limited to the traditional plan providing a "fixed" retirement annuity. It instead broadly encompasses any plan which does not satisfy the definition of an "individual account plan" or "defined contribution plan" as ". . . a pension plan which provides for an individual account for each participant and for benefits based *solely* upon the amount contributed to the participant's account, and any income, expenses, gains, and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34) (emphasis supplied). As a result of the statutory definition, any element of an employer guarantee or a promise of payment which varies from the actual market value of an individual account will legally transform a plan into a "defined benefit" plan. The "guarantee" need be no more than the traditional insurance guarantee of recovery of principal over a 20 or 30-year period or minimal interest which is economically

[3] The priority is based on the fact that employees already have paid taxes on their contributions. See, *Braniff Airways, Inc. v. Bankers Trust Co. (In Re: Braniff Airways, Inc.)*, 27 B.R. 222, 229 (Bankr. N.D. Tex. 1982) (denying priority under 29 U.S.C. § 1344(a)(2) to pre-tax contributions by company despite denomination as "employee contributions" in plan document).

meaningless. C.f. *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 209 n.12, 87 S.Ct. 1557, 1561 n.12 (1967) (insurer's "guarantee" set so low that never triggered); *Peoria Union Stock Yards Retmt. Plan v. Penn Mutual Life Ins. Co.*, 698 F.2d 320, 324-325 (7th Cir. 1983) (same for pension insurance contract). While the definition is entirely qualitative in assigning any plan with any legal element of employer risk to the defined benefit category, ERISA shows Congressional sensitivity to the *quantity* as well as the *quality* of employer risk.

The presence of employee contributions alters the underlying legal and economic assumptions about a defined benefit plan to create a hybrid form. Employee contributions minimize and may even eliminate the need for substantial employer contributions—as indeed appears to have happened in the Hughes Plan. As employee contributions are regular and not dependent on current actuarial computations of funding needs, they also limit the volatility of employer contribution obligations. Ongoing employee contributions and investment gains on those contributions in good markets certainly reduce the risk that a pension fund will suddenly develop unfunded liability in a drop in the stock markets and trigger a need for large and immediate employer contributions. The willingness of employees to participate in this program and their confidence in the basic system is destroyed if they are not assured that the fruits of their contributions and investment are protected against loss.

The presence of employee contributions creates a right to a minimum pension benefit, 29 U.S.C. § 1054(c), Brief of United States, p. 4, in marked contrast to the general ERISA rule. The "minimum benefit" is stated in terms of a lump sum account equal to employee's contributions plus safe interest at 5% through 1987 and thereafter a Treasury rates, 29 U.S.C. § 1054(c)(2)(C) (definition of "accumulated contributions" account); See also, n.2 (safe interest on employer contributions).

This lump sum value is only converted into a "fixed" minimum annuity benefit to be provided by the plan under a statutory formula, 29 U.S.C. §§ 1054(c)(2)(B), (c)(3), 1055(g)(3). The same "account balance" is used to define the employee's rights based on his contributions on termination of a defined benefit plan, 29 C.F.R. §§ 4044.11(b), 4044.12(b). *Borst v. Chevron*, 36 F.3d 1308, 1315 (5th Cir. 1994) correctly closed the circle with its observation that "ERISA [through 29 U.S.C. § 1344(d)(3)] markedly distinguishes between [residual assets] attributable to employer contributions and those attributable to employee contributions."[4] These statutory provisions all highlight a Congressional intent to track and give employees the fruits of their "investment" in the pension contract. They foreclose the idea that Congress somehow implicitly repealed the common law to allow employers to use employee money with impunity.

B. 29 U.S.C. § 1058 Provides Parallel Protection Of Employee Claims To Residual Assets Attributable To Their Contributions In A Pension Plan Merger Or Transfer Before They Are Used To Cover Other Pension Debts Of An Employer

The factual question of whether the *Hughes* transaction involved one or two plans resolves the remaining issues presented in the case. If there are two plans, then Hughes' use of assets of the 1953 Plan for the new 1991 Plan violates the prohibition against inurement which allows pension plan assets to be used *only* for "the "exclusive purposes of providing benefits to participants *in the [1953] plan* . . . and defraying reasonable expenses of administering the plan," 29 U.S.C. § 1103(c)(1). "Whether a [separate] plan exists within the meaning of ERISA is a 'question of fact' . . ." for the courts, *Deibler v. UFCW Local 23*, 973 F.2d 206, 209 (3d Cir. 1992) (quoting

[4] The Fifth Circuit carefully noted that it was not addressing a contributory plan, *Borst*, 36 F.3d at 1313 n.6 (issues on contributory CRP and SAP Plan were settled and not before court).

Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077, 1082 (1st Cir. 1990), in light of the complete change in core plan features involving "intended benefits, beneficiaries [and the] source of financing," *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1992) (en banc), in the Hughes transaction.

The existence of two plans directly implicates claims under 29 U.S.C. § 1058 which the District Court foreclosed in denying leave to amend. 29 U.S.C. § 1058 provides:

> A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after September 2, 1974, unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated).

Kinek v. Paramount Communications, 22 F.3d 503, 509, 511 (2d Cir. 1994) held that the language of 29 U.S.C. §1058 provides "unambiguously that plan participants are entitled, . . ., to exactly what they would have received in the event of an actual termination" and nothing less in a merger, consolidation or transfer of assets or liabilities between pension plans.

The term "amendment" simply means change. The IRS defines a plan "amendment" to encompass—rather than being mutually exclusive of—other characterizations of a transaction. See IRS Regulation [26 C.F.R.] 1.411(d)-4 Q&A2(a)(3)(i) ("[t]he prohibition against the elimination of . . . [accrued benefit promises by plan amendment under 26 U.S.C. §411(a)(6) and 29 U.S.C. § 1054(g)] . . . applies to plan mergers, spinoffs, transfers and transactions amending or having the effect of amending a plan to transfer benefits"). *C.f. Comm'r v. Court Holding Company*, 324 U.S. 331, 334, 65 S.Ct. 707, 708 (1945) (transaction treated as a sale based on its substance notwithstanding the absence of a sales agreement); *Minnesota Tea Company v. Helvering*, 302 U.S. 609, 613, 58 S.Ct. 393, 394 (1938) ("a given result at the end of a straight path is not made a different result because reached by following a devious path"). If transactions of the *Hughes* variety are subject to 29 U.S.C. § 1058 with the same protection of employee interests as a formal termination, the issues presented by Hughes have little importance for future cases.

A "transfer" within the meaning of 29 U.S.C. § 1058 (and its counterpart in the Internal Revenue Code, 26 U.S.C. § 414(1)) occurs whenever there is a reduction in the assets or liabilities of one plan and corresponding increase in the assets or liabilities of another plan and expressly includes transfers of employees between plans, I.R.S. Regulation [26 C.F.R.] 1.414(1)-1(b)(3) ("Transfer of Assets or Liabilities").[5] *Jacobson v. Hughes Aircraft Co.*, 105 F.3d 1288, 1291, 1306 (9th Cir. 1997) notes that Hughes gave its employees a one-time choice between the "Contributory Plan" and "Non-Contributory Plan" which falls squarely within this definition.

Judges Cudahy, Posner and Brown of the Seventh Circuit concluded that a plan "amendment" to change its benefit structure and financing can also be a "merger" or "transfer" which is subject to 29 U.S.C. § 1058 in *Hickerson v. Velsicol Chemical*, 778 F.2d 365, 378 (7th Cir.

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[5] 26 U.S.C. § 414(1) is the parallel in the Internal Revenue Code to 29 U.S.C. § 1058. The regulations were adopted in 1979 and have become obsolete in part as a result of subsequent legislation, including the 1987 amendments to ERISA in 29 U.S.C. § 1344(d)(3). See, e.g., Rev. Rul. 86-48, 1986-1 C.B. 216, and Rev. Rul. 85-6, 1985-1 C.B. 133 (contingent benefit obligations protected by 1984 amendments in 29 U.S.C. § 1054(g)(2) and 26 U.S.C. § 411(d)(6) must be valued and protected under 26 U.S.C. § 414(1) and 29 U.S.C. § 1058 despite language of regulations protecting only "accrued benefits.")

1985). In *Hickerson,* 778 F.2d at 367, 373-374, 378-379, the Seventh Circuit treated an "amendment" of a defined contribution plan (in which all investment earnings go to employees) to convert it into a defined benefit plan as a sequential transaction involving the establishment of a new plan followed by a merger of the old and new plans.

The employer in *Hickerson* sought to use a formula using an excessively low interest rate to minimize employee interests and maximize the offset to its funding obligation while the employees sought to have the benefit of the better of actual future investment returns or the new defined benefit, *Hickerson,* 778 F.2d at 372, 377. The Seventh Circuit concluded that ". . . ERISA allows plan amendment. But it is a different matter to permit this flexibility to become the basis for . . . changes [in a plan] in an attempt to generate a windfall." *Hickerson,* 778 F.2d at 377. It prevented a windfall on either side by requiring the plan to appraise its assets at market value and provide a minimum benefit based on the annuity which could be purchased in the market with the employees' money as if the plan had terminated at the time of the "amendment," *Hickerson.* 778 F.2d at 379. The same relief is both feasible and necessary here to prevent a windfall to Hughes and employees who have never contributed to the pension plan.

A merger is defined by 26 C.F.R. § 1.414(l)-1(b)(2), (1) only in circular terms as the ultimate legal result of a traditional corporate merger—an assumption of all liabilities and assets by a single entity. See, *Hickerson,* 778 F.2d at 374 (so noting). As in *Hickerson,* Hughes' plan "amendment" might also properly be characterized as a two-step transaction, involving the establishment of a new Non-Contributory Plan which then was merged with the existing Contributory Plan in a transaction subject to 29 U.S.C. § 1058.

29 U.S.C. § 1058 works in a defined benefit plan by applying the asset allocation rules of 29 U.S.C. § 1344 to impose a "snapshot" of the funding level of each plan at the date of merger or transfer and allocating (otherwise unallocated) assets of a defined benefit pension plan to payments due to individual employees. The "snapshot" under 29 U.S.C. §§ 1058, 1344 translates the inchoate and allocated interest of an employee in an ongoing defined benefit plan into a specific dollar amount. This "snapshot" requires valuation of available assets at current market value, *John Blair Communications, Inc. Profit-Sharing Plan v. Telemundo Group, Inc. Profit-Sharing Plan,* 26 F.3d 360, 364-367 (2d Cir. 1994). These assets are then applied to the "market" value of benefit liabilities (in the form of annuity costs) in the priority order of 29 U.S.C. § 1344 until assets are exhausted.[6] The end

[6] In a defined benefit plan, the value of benefits ". . . is determined based upon actuarial assumptions about a number of *future* events, such as rates of return on investments, the benefit commencement date, future earnings, and participant mortality, among other things." *Vinson & Elkins v. Comm'r,* 99 T.C. 9, 13 (Tax Ct. 1992), *aff'd,* 7 F.3d 1235 (5th Cir. 1993) (emphasis supplied); *Mead Corp.,* 490 U.S. at 717, 109 S.Ct. at 2159. The relevant "market" for evaluating the aggregate effect of these factors and valuing a future payment stream is the commercial annuity market. See 29 U.S.C. § 1341(a)(3)(A) (annuity requirement in termination); *Hoefel v. Atlas Tack Corporation,* 582 F.2d 1, 7 (1st Cir. 1978) (damages for failure to pay pension benefits equal cost of commercial annuity); *Hickerson,* 778 F.2d at 379, n.22 (use of annuity costs to value benefits in pension transfer process). Annuity costs may be determined by an actual commercial annuity quote at the relevant calculation date, 29 C.F.R. § 4044.71, or standardized assumptions issued periodically by PBGC based on a survey of the commercial annuity market, 29 C.F.R. § 4044.41(a). See, Proposed Rules, Part 2619, Valuation of Benefits in Non-Multiemployer Plans, 51 Fed. Reg. 10334 (March 25, 1986) (survey produces results "within a few percent of the cost of commercial annuities"); Notice, PBGC (Survey of Nonparticipating Single Premium Group Annuity Rates), 61 Fed. Reg. 36771 (July 12, 1996) (description of survey process).

result is a simple and objective rule that "money follows the participant" in a reorganization of a pension plan.

The "benefit" protected by the 29 U.S.C. § 1058 "snapshot" in a merger or transfer is a lump sum cash value defined by an allocation of assets, *Gillis v. Hoechst Celanese*, 4 F.3d 1137, 1149-50 (3d Cir. 1993) (29 U.S.C. § 1058 incorporates the rules of 29 U.S.C. § 1344 on allocation of assets in a plan termination to assure that the level of benefit security provided by plan assets is not reduced).[7] There is no guarantee that the allocated assets actually will buy an annuity for the full retirement benefits promised to the participant by the employer. See, e.g., *Steelworkers Local 2116 v. Cyclops Corporation*, 860 F.2d 189, 200 (6th Cir. 1988) (assets ran out in 29 U.S.C. § 1344(a)(3) priority); *Aldridge v. Lily-Tulip, Inc. Salary Retirement Benefits Committee*, 953 F.2d 587, 591-592 (11th Cir. 1992) (assets exhausted before 29 U.S.C. § 1344(a)(6) category). On the con-

[7] The argument that the term "benefit" in 29 U.S.C. § 1059 was really meant to apply only to the naked promise of an "accrued benefit" rather than the security for payment of that benefit through allocated plan assets has multiple defects. Congress has specifically defined the term "accrued benefit" in 29 U.S.C. § 1002(23)(A) to refer to the naked benefit promise—whether or not funded. It has then used this term throughout the statute when it wished to refer to the bare promise (as opposed to its funding status or security for payment) including separate protection of the benefit promise against change in a merger or transfer through the separate rules of 26 U.S.C. § 411(d)(6) and 29 U.S.C. § 1054(g). These provisions and the limitation of 29 U.S.C. § 1344(a)(6) to "benefits under the plan" are superfluous if the word "benefit" in 29 U.S.C. § 1058 excludes statutory rights apart from the "accrued benefit." *See Mead Corp.*, 490 U.S. at 722-723, 109 S.Ct. at 2162 ("under the plan" modifier limits priority to contractual plan benefits). While Hughes benefits, sponsors of underfunded plans would be hurt as they would be required to fund all promised benefits under the plan—in order to make sure that each employee would receive his full "accrued benefit" if the plan terminated immediately after the merger or transfer—as a condition to any merger or transfer of an underfunded plan under Hughes' approach.

verse side, the plain language and purpose of 29 U.S.C. §§ 1058, 1344(d)(3) give the employee an appraisal right to the fruits of investment of his contributions when assets run past the priority for "benefits under the plan" in 29 U.S.C. § 1344(a)(6) before that money is used to cover an employer's liability to a different group of participants in another plan through a merger or transfer.

Hickerson and *Jacobson* are not alone in protecting employee claims in mergers or transfers before a formal plan termination. The consensus view of the ABA Employee Benefits Section, (Sacher, et al. Eds), *Employee Benefits Law*, pp. 177-178 (ABA 1991), considered it obvious that ERISA requires that residual assets attributable to employee contributions must follow the employees in a pension plan transfer or merger. *Kinek* followed the same path as the ABA. In *John Blair*, 26 F.3d at 365, the Second Circuit held that 29 U.S.C. § 1058 prevented an employer from "pocketing" investment gain attributable to the assets of a transferred defined contribution plan for itself and its employees. *Holland*, 22 F.3d at 973, rejected a convoluted spinoff followed by an immediate termination which sought to reduce employee claims to .0015% of residual assets even though employees had contributed roughly 25% of the total contributions to the plan.

An illustration by combining the facts of *Brillinger v. GE*, 130 F.3d 61 (2d Cir. 1997) and the sale of GE Aerospace which is at issue in *Flanigan v. GE*, No. 3:93 CV 516 (D.Conn.) shows the evasion of 29 U.S.C. § 1344(d)(3) which results in the absence of a full allocation of assets in a plan transfer or spin-off. Assume that GE acquired RCA with an RCA plan with $1,468,-009,771 in basic benefit obligations under plan terms and $2,812,386,947 in assets, GE then sells all of RCA's business and employees to Thomson Consumer Electronic or, in *Flanigan*, Lockheed. If "surplus" does not have to be allocated in a transfer, GE can transfer all of the

employees and retirees to a new Thomson or Lockheed pension plan along with only $1,468,009,771 in assets for basic benefit obligations. The RCA plan would remain in GE's hands with $1,344,377,176 in residual assets and no liabilities. Using the "spinoff/termination" technique from *Holland*, 22 F.3d at 970 n.3, GE would then terminate the RCA Plan and take a reversion of the entire surplus, including assets attributable to employee contributions. Employees would never see the gain on their contributions as GE, despite the requirements of 29 U.S.C. § 1344(d)(3) and condemnation of *John Blair*, 26 F.3d at 365, "[pocketed] the difference which rightly belong[ed] to the . . . [employees]" for its own direct use and benefit.

Section 1058 also imposes "anti-dilution obligations" in a merger, *Malia v. Gen. Electric Co.*, 23 F.3d 828, 833 (3d Cir. 1994). In a simplified version of *Brillinger*, the RCA plan had $1,468,009,771 in basic benefit obligations under plan terms and $2,812,386,947 in assets when it was merged into a much larger GE plan which had benefit liabilities of some $15 billion and assets of roughly the same amount. If employee contribution benefits under 29 U.S.C. § 1344(a)(2) for the RCA Plan before the merger equaled 25% of total basic plan benefits of $1,468,009,771 or $367,002,443, the employees' share of residual assets of the RCA Plan under 29 U.S.C. § 1344(d)(3) before the merger would be as follows:

$$\frac{\$367{,}002{,}443 \quad \text{[25\% of total liabilities of \$1,468,009,771]}}{\$1{,}468{,}009{,}771 \quad \text{[RCA Plan basic benefit liabilities]}}$$

The employees would then have been entitled to 25% of the residual assets of $1,344,377,186 or $336,094,297. Without a special allocation or minimum annuity (under the *Hickerson* approach) to protect the employee interest in residual assets, the fraction in the event of a termination of the GE plan immediately after the merger would

decline as $15 Billion in GE Plan liabilities is added to the denominator.

$$\frac{\$367{,}002{,}443}{\$16{,}468{,}009{,}771 \quad \text{[combined RCA Plan and GE Plan basic benefits]}}$$

While the residual assets would remain constant, the RCA employees now would be entitled to only 2.23% of the residual assets or $29,960,494—a reduction of some $306,122,802 overnight. The *Brillinger* court simply lost sight of this $300 million overnight loss in concluding that RCA employees have received the same "benefit" in the merger as they would have received if the RCA Plan had terminated immediately before the merger. See, n. 7.

III. THE DISPOSITION OR ALLOCATION OF PLAN ASSETS TO IMPLEMENT A TERMINATION, MERGER OR TRANSFER BETWEEN PLANS IS A FIDUCIARY FUNCTION

"[T]he purpose of ERISA . . . is to immunize an employee benefit plan from the employer's interest; [and] . . . Once [a plan is] in existence, [it's] assets are plan assets . . . subject to ERISA's high fiduciary standards." *Reich v. Valley Nat'l Bank of Arizona*, 837 F. Supp. 1259, 1286 (S.D.N.Y. 1993). It is fundamental to the concept of a trust that assets placed in trust are held subject to the direction and control of the trustee—not the grantor. A separation of power between the "legislative" power of a "settlor" to define the property to be contributed to a trust and its liabilities and the "executive" power of a "trustee" to control assets held in trust is central to the very concept of a trust both at common law and under ERISA.

At common law, the settlor of a trust has the power to specify its benefits and beneficiaries, *Bogert*, § 993, pp. 230-233. Indeed, a settlor must either identify beneficiaries and the benefits to be paid to them or establish

a definite and certain standard for identifying beneficiaries and allocating assets of the trust to them in order to create a trust, *Bogert*, §§ 162, 182, pp. 138, 343-345; *Restatement*, § 120, pp. 252, 254. A transfer which provides complete and unbridled discretion in a trustee to use assets as he wishes creates a gift rather than a trust, *Bogert*, § 162, pp. 143-145.

Once a trust is created, however, it becomes the duty of the trustee to identify the beneficiaries of the trust and to collect, preserve and distribute the property of the trust which is held for them, *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570, 572, 105 S.Ct. 2833, 2840, 2841 (1985) citing *Bogert* § 582, p. 346; § 583, at 348; *Restatement* §§ 175, 176, 177, pp. 380, 381, 383. The trustee must take possession of the property from the settlor or other person whether the trust is gratuitous or for consideration, *Bogert*, § 583, pp. 348-350, 355; *Restatement* §§ 175, 177, pp. 380, 381 Comment f, 383. Even in a gratuitous trust, the trustee has a duty to oppose any effort to invade or destroy the trust unless it is clearly unreasonable to do so, *Bogert*, § 581, p. 334, § 1001, p. 325; *Restatement*, § 178, p. 385. A power to control the assets of the trust or to direct their use renders the holder of the power subject to fiduciary duty in the exercise of the power even if he is not designated as a trustee, *Restatement*, § 185, p. 397 Comment e. By the very definition of a trust, *Bogert*, § 583, pp. 349, *Restatement*, §§ 2,175, pp. 10, 381, it is thus the trustee who has the legal interest in the property and exclusive possession and control of the assets of the trust.

It remains the duty of the trustee—not the settlor—to allocate and transfer assets in the event of a change of trustees or plan termination, *Bogert*, § 861, p. 22, § 1010, pp. 452-455; *Restatement*, §§ 344, 345, pp. 190, 193. A trustee faced with change of trustee, wind-up or termination of the plan has an obligation to distribute

the property of the trust to the new trustee or, in a termination, the correct beneficiary, *Bogert*, § 1010, pp. 457, 458; *Restatement*, §§ 344, 345, pp. 190, 193. As *Bogert*, § 583, p. 363, observes, a new trustee who is taking over from a prior trustee should assure that he has made a complete and accurate accounting and received delivery of the trust property due him. If there is a default in the transfer, the trustee must sue to correct it, *Bogert*, §§ 583, 592, pp. 367-369, 407; *Restatement*, § 177, p. 383.

John Hancock Mutual Insurance Company v. Harris Trust & Savings Bank, 510 U.S. 86, 95, 114 S. Ct. 517, 523-524 (1993) quoting 29 U.S.C. § 1002(21)(A) (emphasis in the original) recently emphasized that "[a] person is a fiduciary with respect to an employee benefit plan 'to the extent . . . he exercises . . . *any authority or control respecting management or disposition of its assets*. . . .'" This includes a distribution or allocation of *plan* assets in a plan termination as 29 U.S.C. § 1344(a) provides that *a fiduciary*—the ". . . plan administrator shall allocate the assets of the plan among the participants and beneficiaries . . ." to pay benefits. See also, 29 U.S.C. § 1108(b)(11), (f) (prohibited transaction exemption for transfer of assets or liabilities between multiemployer plans under governmental supervision); 29 U.S.C. § 1108 (b)(9) (exemption for "*fiduciary* . . . distribution of the assets of the plan in accordance with the terms of the plan if . . . distributed . . . as provided under [29 U.S.C. § 1344]"). The same rule applies in plan asset transfers, *Steelworkers, Local 2116*, 860 F.2d at 198 (actual disposition of pension plan assets in sale is subject to fiduciary duty as distinguished from basic decisions about structure), and the allocation of residual assets between employer and employees, *District 65, UAW v. Harper & Row Publishers, Inc.*, 670 F. Supp. 550, 557 (S.D.N.Y. 1987) (citing Department of Labor Letter (March 17, 1986) reprinted at 13 BNA Pension Reporter 472-473).

ERISA thus codifies the common law powers of a trustee —as opposed to a settlor—over trust assets.

The dictionary and common law reach the same result in treating a fundamental alteration of the beneficiaries or purpose of a trust as a fiduciary "disposition" of trust assets which is subject to judicial regulation. In *Montgomery v. Carlton*, 99 Fla. 152, 169, 126 So. 135, 142 (1930), the court held that "[d]isposed of 'means' to part with; to relinquish; to get rid of." It found that language in the trust "that the premises shall be used, kept, maintained and *disposed of* as a place of divine worship," constrained the trustees to apply the proceeds of a sale of trust property for the uses and purposes of the trust, *id.* (emphasis supplied). The common law similarly treated the transfer or division of trust assets between employers as the equivalent of a sale of trust assets and termination of the trust. See *In Judicial Settlement of the Account of the Marine Midland Trust Company of New York*, 144 N.Y.S.2d 4, 6 (N.Y. Sup. Ct. 1955) (petition for termination of fund and division of assets among successor employers approved based on valuation of assets at fair market value). In *Coe*, 149 Mass. at 550, 21 N.E. at 967, the court described an action to allocate trust assets between employer and employee interests as a claim ". . . to *dispose* of the whole of this Fund."

The courts have followed the lead of the common law and Department of Labor to distinguish a lawful employer act to amend, terminate or merge an employee benefit plan from unlawful acts to misallocate or transfer plan assets in the implementation of the reorganization. See, e.g., *Reich v. Lancaster*, 55 F.3d 1034, 1057 (5th Cir. 1995) (notice of lawful merger is not notice of unlawful acts in its implementation to trigger statute of limitations). As in any situation involving large sums of money, abuse has reared its ugly head and required a remedy under the fiduciary rules of ERISA. See, *John Blair*, 26 F.3d at 363-364, 367 (fiduciary breach in

unlawful delay between calculation of participant balances and actual asset transfer to keep an extra $500,000 in investment gains in a lawful spinoff); *Pilkington PLC v. Perelman*, 72 F.3d 1396, 1397-1398, 1401 (9th Cir. 1995) (self-dealing and kickbacks in a lawful termination to give employer $13 Million; employees left with insolvent insurer); *Waller v. Blue Cross of California*, 32 F.3d 1337, 1341 (9th Cir. 1994) (claimed imprudent purchase of annuity contract from insolvent insurer in lawful termination); *District 65, UAW v. Harper & Row Publishers, Inc.*, 576 F. Supp. 1468, 1480 (S.D.N.Y. 1983) (actuarial games with interest rates to minimize employee distributions and maximize employer reversion in lawful termination). There is no remedy in the statute for such misconduct outside the fiduciary responsibility provisions of ERISA.

The decision in *Systems Council EM-3 v. AT&T Corp.*, 972 F. Supp. 21 (D.D.C. 1997) starkly illustrates the need to separate an employer's legislative or settlor acts from their implementation in an allocation or disposition of plan assets. AT&T previously negotiated separate trusts under 26 U.S.C. § 501(c)(9) to fund anticipated retiree medical liabilities. These trusts were funded, in part, by a negotiated transfer of surplus pension plan assets under 26 U.S.C. § 420. The AT&T retiree medical trusts had benefit liabilities of $9.125 Billion and assets of only $2.895 Billion, and were thus insolvent on a "balance sheet" basis when AT&T divested Lucent Technologies in a spin-off.

The common law requires a pro rata distribution of the assets of an insolvent trust among its creditors or beneficiaries, *Cunningham v. Brown*, 265 U.S. 1, 13, 44 S. Ct. 424, 427 (1924); *Goldberg v. N.J. Lawyer's Fund for Client Protection*, 932 F.2d 273, 280-281 (3d Cir. 1991). The benefits claims of employees are liabilities of the AT&T Welfare Trusts with priority over any employer claim, 29 U.S.C. § 1132(d) (employees have benefit claims against plan assets). See *Wilson v. Blue-*

field Supply Co., 819 F.2d at 459 ("residual" assets mean only assets remaining *after* payment of benefits); *In Re*: *William H. Luden, Inc. Employees Trust Fund*, 72 D&C 566, 570 (Pa. Comm. Pleas 1949) (applying rule to divide pension plan assets among employes even in the absence of "vested" claims). The District Court, *Systems Council EM-3*, 972 F. Supp. at 31, 32, nonetheless held that *Lockheed v. Spink* allows an employer to transfer employees and more than \$6.341 Billion in liabilities to Lucent while retaining every dime of \$3 Billion in trust assets to overfund its retained liabilities of \$2.784 Billion with no possibility of judicial review. This legitimatizes conduct which would be a fraudulent conveyance at common law.

The Court has never given such an expensive reading to employer powers with respect to plan assets under ERISA. *Comm'r v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 113 S. Ct. 2006, 2009 (1993) held that passive acceptance of real estate—rather than cash—by a pension plan trustee in satisfaction of the employer's minimum funding contributions violates the tax paralled to 29 U.S.C. § 1106(a)(1)(A) because the employer can overvalue the property to its benefit and reduce a large cash debt. A trustee also cannot passively accept an employers' efforts to invade the actual corpus of the trust to transfer assets attributable to employee contributions for "use by or for the benefit of," 29 U.S.C. § 1106(a)(1)(D), a different plan or group of employees and to offset Hughes' obligation to fund pension benefits for a different plan or group.[8]

The same concepts are part of ERISA's specific prohibition against inurement of plan assets to the employer

[8] The use of surplus assets attributable to employer contributions may not raise the same issues. The employer is the beneficial owner of these assets in a termination, merger or transfer under 29 U.S.C. §§ 1058, 1344(d)(3).

sponsor, 29 U.S.C. § 1103(c), as well as its general rules of fiduciary duty. *Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 592, 113 S.Ct. 2252, 2259 (1993), recognized a possible ERISA claim on remand over retention of welfare plan assets attributable to withdrawing or transferred employees. See further, *Trapani v. Consolidated Edison Employees Mutual Aid Society, Inc.*, 891 F.2d 48, 50 (2d Cir. 1989) (unjust enrichment in retaining assets allocable to transferred employees); *John Blair*, 26 F.3d 370 (employer and its plan would be unjustly enriched by holding investment earnings allocable to transferred participants). An employer similarly cannot apply plan assets to its own debts without violation of 29 U.S.C. § 1103(c), *FDIC v. Marine Nat'l Exchange Bank of Milwaukee*, 500 F. Supp. 108, 113 (E.D. Wisc. 1980). Whether assets are retained while participants leave or are transferred to offset employer liabilities in a new plan, there is inurement in the use of "other people's money."

CONCLUSION

ERISA is not a new statute in perpetuation of frauds. The Court should determine that employees have a right to protection of assets attributable to their employee contributions against loss or dilution in a termination, merger or transfer of defined benefit pension plans and remand for further proceedings in accordance with this rule.

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